United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2224

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United States Court of Appeals

FOR THE SECOND CIRCUIT

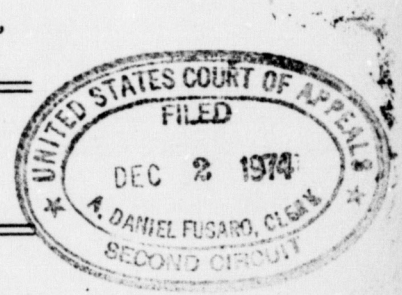
DOREEN RAPPAPORT, DESMOND CALLAN, M.D., CAROLA DIBBELL and ROBERT CHRISTGAU, for themselves and others similarly situated,

Appellants,

-against-

HERMAN KATZ, individually and as Clerk of the City of New York,

Appellee,



BRIEF FOR APPELLANTS

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Questions Presented

May a federal court refuse to exercise its jurisdiction to hear a case raising constitutional issues if the only basis for that refusal is its belief that a state forum would be more appropriate?

Do individuals have a constitutional right to control their own personal appearance?

Does the state have a legitimate interest in requiring brides who get married by the New York City Clerk to wear skirts or dresses; grooms to wear jackets and ties; and couples to exchange at least one wedding ring?

May brides and grooms who get married by the City clerk be required to dress according to contemporary community standards?

Statement of the Case

Plaintiffs challenge two regulations promulgated by defendant Herman Katz, the Clerk of the City of New York,* governing marriage ceremonies conducted by him and members of his staff under color of Section 11 of the New York Domestic Relations Law on the grounds that they violate plaintiffs' constitutional rights to privacy, free expression, due process and equal protection.

The first challenged regulation requires brides to wear "a dress or skirt and blouse -- no slacks..." and grooms to wear a coat and tie. The second regulation requires that couples exchange either one or two rings. (A22).**

A. Plaintiffs Rappaport and Callan

Plaintiff Doreen Rappaport is 34 years old and is employed as an independent producer of educational films. Her husband, Desmond Callan, 48 years old, is a physician. Ms. Rappaport and Dr. Callan were married by an agent of defendant in November, 1973.

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*Defendant Katz has recently resigned as City clerk. He remains a defendant for purposes of the claim for money damages. A new City clerk has not yet been appointed.

**"A" refers to the appendix.

Plaintiffs Rappaport and Callan became engaged to marry in July of 1973. In preparation for their marriage, they together chose a green velvet pants suit and a silk blouse in Paris for Ms. Rappaport to wear to the ceremony. Plaintiffs invited their families and several close friends to the wedding, including a professional photographer to take pictures. They ordered flowers for themselves and other members of the wedding party and made reservations for a post-wedding luncheon for twenty-five guests in a private room at a nearby restaurant.

Several days before the ceremony, plaintiff Rappaport went to the City Clerk's office to make sure that the chapel would accomodate all of the invited guests. She was then given a copy of defendant's regulations. Although she did not believe that her own outfit would be considered "inappropriate" by defendant, she went to his office to make sure. She was told by defendant's secretary that the no-pants regulation was strictly enforced, and that she would not be allowed to get married in her suit.

Plaintiff had neither time nor desire to buy an entirely new outfit in the few days remaining before her marriage. She does not customarily spend as much money on her clothes as she spent on her pants suit and accessories and had done so on this occasion only as a special wedding splurge. She did not

feel it was right to splurge a second time nor did she wish to wear old clothes or buy a less expensive, more ordinary outfit for her wedding, particularly as she liked her new suit a great deal and had told her friends and family about it.

Not wishing to risk being sent home from her own wedding in front of her groom, family and friends to change her clothes, however, plaintiff selected from her wardrobe a skirt to bring with her. The skirt was made of green hand-knitted material which matched her jacket more closely than any other skirt she owned. It was, however, a different shade of green and made of different material than her jacket, and was far less formal than the rest of her outfit. Because the skirt was several years old and styles had changed, it had to be lengthened. There was not time to have the skirt altered professionally, so plaintiff had to sew it herself, which she was not proficient at doing. Hand-knitted material is difficult to sew and the hem was bulky and made the skirt hang awkwardly. Further, plaintiff did not possess a steam iron and was unable to entirely press out the fold where the old hem had been. Plaintiff did the best she could, but still hoped that she would not be required to change her planned attire.

On her wedding day, plaintiff, wearing her new suit, and carrying her skirt, went to the City Clerk's office with Dr. Callan and her family and friends. Before being permitted

to sign the marriage register, plaintiff was told by a clerk that she must change into a skirt. Not wishing to spoil the occasion any further with an unpleasant argument, she retired to a restroom and changed into her ill-fitting, unmatching skirt. She then signed the register and the ceremony took place. Plaintiff was so embarrassed by her appearance, however, that she requested the photographer not to take any long distance pictures of the wedding ceremony, as she had wished to have him do, but only close-ups which would not show the skirt. Immediately after the ceremony, plaintiff changed back into her pants for pictures and for her wedding luncheon.

B. Plaintiffs Christgau and Dibbell

Plaintiff Robert Christgau, age 32, is a well-known reviewer of popular music. He is the author of a very favorably reviewed history of rock music between 1967-1973. He is a regular reviewer for Newsday and has published articles in many other magazines. Plaintiff Dibbell, who is 29, is also a journalist whose work has appeared in many publications, including Esquire, Oui, and The Village Voice.

Plaintiffs Christgau and Dibbell are engaged to be married and wish to have the ceremony performed by defendant or a member of his staff in the City clerk's office. They be-

lieve strongly in the equality of husband and wife in marriage and wish to symbolize this belief by wearing matching outfits at their wedding. (A114-117). Ms. Dibbell rarely wears a dress or skirt, and plans to be married in pants. They have been informed that defendant will not marry them unless they comply with his regulations.

C. Decision below.

The court below dismissed the complaint without making a determination on the merits on the ground that the case would be "best and most appropriately resolved by the State of New York and the New York City Council to whom the defendant is responsible." (A146).

ARGUMENT

Point I. THE COURT BELOW ERRED IN REFUSING TO ACCEPT OR RETAIN JURISDICTION OF THIS CASE

The opinion of the lower court (Pollack, J.) (A135-147), is directly contrary to the intent of Congress and to holdings of the United States Supreme Court regarding the scope of federal jurisdiction in civil rights cases.

The court below made no finding as to the constitutionality of defendant's regulations. On the contrary, Judge Pollack specifically stated that his dismissal of the suit was not "based upon or any reflection upon the merit of [the] complaint or the alleged justification for [defendant's] guidelines...."(A145). Rather, the court simply declined to accept jurisdiction of the case on the grounds that "Federal judges have too much to do" to become involved in cases that in his opinion are "best and most appropriately resolved" by state courts. (A146). This is not a permissible basis for a federal court to decline to exercise jurisdiction.*

Although Judge Pollack did not retain jurisdiction of the case, what he did in effect was to abstain from hearing

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*Plaintiffs' dispute the contention of the lower court that they in fact have an adequate state remedy. The New York State courts have consistently taken the position (directly opposed to that of the Second Circuit) that government regulation of an individual's personal appearance does not present a constitutional issue. See Jackson v. N.Y.C. Transit Authority, 41 A.D.2d 646, aff'd 33 N.Y.2d 958 (1974).

it so that the state courts could have the opportunity to do so. This decision indicates a misunderstanding of the doctrine of abstention.

Abstention, as invented by Justice Frankfurther in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941), is designed to allow a federal court to refrain from determining constitutional questions where the controversy may be resolved by the less drastic means of clarifying state law. Functionally, therefore, abstention is little more than an application of the rule that courts ought not to decide constitutional questions if an alternative, non-constitutional basis of disposition exists. Thus, in order to be properly invoked, abstention requires the existence of a genuinely ambiguous issue of state law, which might, if clarified, make it unnecessary to decide the constitutional issue.

In Zwickler v. Koota, 389 U.S. 241 (1967), the Supreme Court fixed, in the strongest possible terms, the principle that a claimant under the federal constitution and 42 U.S.C. §1983 has the right to choose "a federal forum for the hearing and decision of his federal constitutional claims," 389 U.S. at 248, notwithstanding the possibility of relief in a state forum. The Court in Zwickler declared:

> We yet like to believe that wherever the federal courts sit, human rights under the Federal Constitution are always a proper

> subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." Stapleton v. Mitchell, 60 F. Supp. 51,55; see McNeese v. Board of Education, 373 U.S. at 674, note 6. . . The judge-made doctrine of abstention, first fashioned in 1941 in Railroad Commission v. Pullman Co., 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643, sanctions such escape only in narrowly limited "special circumstances." Propper v. Clark, 337 U.S. 472, 492, 93 L.Ed. 1480, 1496, 69 S.Ct. 1333." 389 U.S. at 248.

The primary "special circumstance" -- and overwhelmingly the most frequent situation -- which has been held to make federal abstention appropriate is the existence of an ambiguous state statute, or occasionally a regulatory scheme, the state judicial determination of which might obviate the need for a decision on federal constitutional grounds.

Judge Pollack, however, did not suggest that any such ambiguous issue of state law exists in this case which should first be decided before the federal court hears the constitutional issues. Rather, he dismissed the case entirely, advising plaintiffs to raise their federal constitutional claims in state court. The Supreme Court, however, has specifically rejected the notion that a litigant may be compelled to raise his federal constitutional claims in state court. In England v. Medical Examiners, 375 U.S. 411 (1964), in holding that a plaintiff has an absolute right to have his federal

questions decided by a federal court, the Supreme Court stated:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." 375 U.S. at 415.

None of the cases relied upon by Judge Pollack to justify dismissal is to the contrary, for in each case, the court declined jurisdiction not because a state forum was available, but because the cases were held not to have presented constitutional questions. Plaintiffs, however, do raise an important constitutional issue which they are entitled by law to have heard in federal court. In refusing to hear their claim, Judge Pollack has engaged in an act of judicial legislation. He has on his own initiative decided that federal judges are too busy to hear certain types of constitutional cases, and can send those cases to a state forum if they consider that forum to be more "appropriate."

Congress, however, in passing §1983, decided differently. In the words of the Supreme Court in Zwickler v. Koota, supra at 298, describing the intent of §1983:

> In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal

> forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, "...to guard, enforce and protect every right granted or secured by the Constitution of the United States." Robb v. Connolly, 111 U.S. 624, 637, 28 L. Ed. 542, 546, 4 S.Ct. 544 (1884).

Contrary to that Congressional intent, the decision below, instead of expanding federal jurisdiction, effectively narrows federal jurisdiction.

It should also be mentioned that Judge Pollack's action was taken sua sponte. The only motion before him was plaintiffs' motion for summary judgment on the merits. Defendant on the day of argument of plaintiffs' motion submitted an "affidavit summary judgment, motions by plaintiffs and defendant" but never submitted a motion of his own, nor did his affidavit raise any jurisdictional objections to plaintiffs' suit. Jurisdiction is mentioned only in paragraph 21 of defendant's answer, to the effect that "marriage solemnization procedures and the effect of marriage contracts and status are exclusively within the sovereign jurisdiction of each of the States of the United States," to which plaintiffs replied in a half page in their brief that the issue in the case was the constitutional issue of government regulation of an individual's personal appearance, which issue is clearly within the jurisdiction of the federal court. Plaintiffs were given

no warning that a challenge to the court's jurisdiction would be raised on any other grounds and had no opportunity to brief the issue. Judge Pollack simply decided a motion that was not before him on the basis of an issue that had never been raised. In Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), this Court held that the similar failure of the District Court to advise the parties that it was treating a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure as a motion for summary judgment was error because the parties were not given "reasonable opportunity" to present material pertinent to such a motion.

Thus, quite apart from the merits of this case, which plaintiffs believe to be substantial, the lower court erred in dismissing for lack of jurisdiction, when that issue was not before the Court and plaintiffs were not given reasonable opportunity to brief that issue.

Point II. THE RIGHT TO CONTROL ONE'S OWN PERSONAL APPEARANCE IS IMPORTANT

The Court below did not reach the merits of this case. Accordingly, it is not necessary for this Court to do so. The merits are discussed here (points II through VIII) to demonstrate that the constitutional issues are substantial.

Few legal questions have caused as much controversy or been as thoroughly litigated during the past several years as the right of citizens to control their own personal appearance, free from interference by state officials.*

Most of these cases were defended, at least in part, on the ground that they were too trivial for federal cognizance -- that they were much ado about nothing. But the courts have consistently recognized that these cases involve fundamental issues of individual liberty. In the words of Chief Justice Wyzanski in Richards v. Thurston, 304 F. Supp. 449, 456 (D. Mass. 1969) aff'd, 424 F.2d 1281 (1st Cir. 1970), a case involving a high school long hair regulation:

> Now it is sufficient to note: first, the issues here presented...are serious in the

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*Well over one hundred cases involving personal appearance regulations have been brought, in every circuit in the country. Most have involved high school students, but many cases have upheld the rights of other groups such as college students, teachers , prisoners, soldiers and police officers, to dress and wear their hair as they please. See, Richards v. Thurston, supra, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); and Bishop v. Colaw, 450 F. 2d 1069 (8th Cir. 1971) (All involved high school students); Seale v. Manson 326 F. Supp. 1375 (D. Conn. 1971) (prisoners); Conrad v. Goolsby, 350 F. Supp. 713 (N.D.Miss. E.D. 1972) (teachers); Lansdale v. Tyler Jr. College, 470 F.2d 659 (5th Cir. 1972)(college students); Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y. 1972)(soldiers); Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973)(police officers).

> eyes of a very large portion of our society (though perhaps the degree of concern varies according to age levels) and that that serious concern involves fundamental liberties. Such serious concern is not purely emotional. It has a rational core. And it is, quite literally a fighting issue for some. To belittle the issue might reveal judicial prejudice, not perceptiveness."

In affirming the lower court's opinion in Richards v. Thurston, supra, the First Circuit pointed out that "'liberty' seems...an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty." 424 F. 2nd at 1284.

The court went on to describe the historical basis for its opinion:

> We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people. The debate concerning the First Amendment is illuminating. The specification of the right of assembly was deemed mere surplusage by some, on the grounds that the government had no more power to restrict assembly than it did to tell a man to wear a hat or when to get up in the morning. The response by Page of Virginia pointed out that even those "trivial" rights had been known to have been impaired -- to the Colonists' consternation -- but that the right of assembly ought to be specified

> since it was so basic to other rights. The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance. 424 F. 2d at 1285.

The right to dress as one pleases is of particular importance on special occasions and at celebrations. Defendant has uttered the conventional wisdom when he describes a wedding as the single most important of a person's life (A15). Whether everyone's wedding day is in fact the most important day of his or her life is an open question, but this Court can surely take judicial notice that to most people it is a memorable day and one on which they pay special attention to their personal appearance, dressing in a manner most symbolic and expressive of their own personalities and life-styles.

In short, there is nothing silly or frivolous about this case except defendant's grounds for defending it. The law is firmly established that the right of citizens to dress as they please is an important ingredient of the constitutional guarantee of liberty.* To uphold defendant's regulations would be to reject the reasoning of over one hundred federal court

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*Plaintiffs do not, of course, contend that they have the right to be married in the nude or dressed in a manner dangerous to public health or safety. Such attire (or lack of it) is already prohibited by the laws of New York State, however, and no argument has been made herein that plaintiffs' attire was obscene, dangerous or unhealthy.

decisions, including this Court's decision in Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

Point III. PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO DRESS AS THEY CHOOSE AT THEIR WEDDING CEREMONIES

Among the many cases in which personal appearance regulations have been challenged, counsel for plaintiffs have not found a single case in which a court has ruled that adults do not have a constitutional right to dress as they please.*

The source of this right has been traced to different sections of the Constitution, depending on the particular facts in each case, including the First Amendment guarantee of free expression (Bishop v. Colaw, supra) and privacy (Breen v. Kahl, 419 F.2d 1034 [7th Cir. 1969]); the Equal Protection Clause (Massie v. Henry, supra); and the Due Process Clause (Dwen v. Barry, supra).

The due process approach has been stressed by this

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*Only in the case of minors are the circuits split over the issue of whether the right to control one's personal appearance is protected by the constitution. The majority of circuits (1st, 2nd, 3rd, 4th, 7th and 8th) have indicated that minors as well as adults do have such a right. See, Richards v. Thurston, supra; Dwen v. Barry, supra; Stull v. School Board of Western Beaver Jr.-Sr. High School, 450 F.2d 339 (3d Cir. 1972); Massie v. Henry, supra; Arnold v. Carpenter, supra; Bishop v. Colaw, supra.

Although the remaining circuits (5th, 6th, 9th and 10th) have upheld the right of school officials to regulate students' personal appearance, all have required that the regulations be rationally related to furthering legitimate educational goals and none has suggested that its holdings should apply to adults as well as to school children. The Fifth Circuit went so far as to say that it would be "patently absurd" to suggest that its

Court. In Dwen v. Barry, supra at 1130, this Court, in upholding the right of a police officer to wear a beard, said:

> We may well base the right on the guarantee under the Due Process Clause of personal liberty on a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints ...' (cites omitted). Personal liberty is not composed simply and only of freedom held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need.
>
> We hold only that the choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation.

Defendant has failed to justify the challenged regulations, and has not shown that the regulations reasonably relate to, or further, any legitimate state interest. The court below indicated that "institutional cases" (i.e., dress codes imposed in schools, police departments, etc.) are somehow distinguishable from the regulations challenged herein, but did not say what the difference is. Plaintiffs submit that there is none, but that if there were, it would weigh in their favor, as there is less

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decision upholding a school hair-length regulation provides a basis for sustaining state regulation of adults' dress and hair-style. Karr v. Schmidt, 460 F.2d 609, 615 n. 13 (5th Cir. 1972).

justification for state regulation of brides' appearance than policemen's. Accordingly, the holding in Dwen, supra, and the reasoning in every other case involving adults to control their personal appearance, requires that the decision of the lower court be reversed and enforcement of the challenged regulations be enjoined.

Point IV. THE STATE CANNOT CONDITION THE GRANT OF A BENEFIT ON THE WAIVER OF A CONSTITUTIONAL RIGHT

Defendant argued below that he may establish any rules he pleases governing marriage ceremonies performed by him or his agents since couples are not required by law to have a ceremony at all, but can simply sign a marriage contract in the presence of two witnesses and a judge.

The availability of alternatives to unconstitutional conduct by state officials has never been considered a justification for such conduct (although the "defense" has frequently been advanced by public officials, including the advocates of "separate but equal" segregated schools).

New York State has chosen to provide that couples wishing a solemnization ceremony may elect to have it performed by the City Clerk. The City Clerk, then, having the power to solemnize marriages, must perform those ceremonies in a con-

stitutional manner for all who fulfill the statutory qualifications.* He may not discriminate against some on the basis of his personal prejudices, or for any other unconstitutional reasons.**

The Supreme Court, in a long line of cases,*** has held that the grant of state-created benefits cannot be conditioned upon the waiver of constitutional rights. Plaintiffs are entitled by statute to be married by defendant and cannot be required by him to forfeit their constitutional right to control their own personal appearance in order to exercise that statutory right.

Point V. DEFENDANT'S REGULATIONS CREATE AN UNCONSTITUTIONAL IRREBUTABLE PRESUMPTION

The defense on which defendant relies most strongly is that every person authorized by law to officiate at a mar-

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*There is no dispute that plaintiffs met and meet all statutory qualifications.

**The analogy to school dress code cases is obvious. States are not required by the constitution to provide any public education. But once they have chosen to do so, they must provide an educationa to all school-age children, not just to those whose personal appearance meets with the approval of their teachers.

***See, Hannegan v. Esquire, 327 U.S. 146 (1946); Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Education, 350 U.S. 551 (1956); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Spevak v. Klein, 385 U.S. 511 (1966); Thorpe v. Housing

riage ceremony is obligated to assure him or herself that couples understand the meaning of marriage and enter into it with a "respectful and solemn attitude" (A59). Defendant's regulation is based upon his belief that "a women wearing pants does not know what she is doing." (A69).

No statute requires that a marriage officiant inquire into the beliefs and attitudes toward marriage of persons who seek to be married by him. Of course, marriage is a contract, and, as with any contract, the state has a legitimate interest in ensuring that persons about to be married understand the legal consequences of their act. Accordingly, defendant could reasonably seek to ascertain that couples who appear before him understand the nature of the marriage contract. He might legitimately require them to read the contract. He might legitimately require that couples not be drunk or under the influence of drugs at the ceremony. He might make them swear that they are not getting married to win a wager. Such procedures would be consistent with the legitimate state interest ensuring that any contract is entered into willingly and knowingly.

But defendant has done none of those things. Rather,

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Authority, 386 U.S. 670 (1967); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. den. 368 U.S. 930 (1962); Frost v. Railroad Comm. of Cal., 271 U.S. 583 (1926); Standard Airlines Inc. v. C.A.B., 177 F.2d 18 (D.C. Cir. 1949); Wolff v. Selective Service, 372 F.2d 817 (2nd Cir. 1967); Shapiro v. Thompson, 394 U.S. 618 (1969).

he has established a shortcut for determining whether couples understand the marital relationship in the form of an irrebutable presumption that couples who do not dress in a style approved by him ipso facto do not understand the marital relationship. Defendant's adherence to this presumption is so rigid that he will not marry a woman in slacks even if he is personally convinced that she has a deeply held belief in the importance of dressing in that manner for her wedding and takes the ceremony very seriously. (A100).

In the past year the Supreme Court has held in two major cases that permanent and irrebutable presumptions violate the due process clause of the the Fourteenth Amendment when the presumption "is not necessarily or universally true in fact" and the state has reasonable alternative means of determining what actually is true. In the first of these cases, Vlandis v. Kline, 412 U.S. 441 (1973), the Court struck down a Connecticut statute which permanently and irrebutably deemed plaintiffs to be non-residents of the state for the purpose of determining their tuition and fees at the State University. In Cleveland Board of Education v. LaFleur, ___ U.S. ___, 39 L.Ed.2d 52 (1974), the Court held unconstitutional the regulations of two boards of education that required all pregnant teachers to take mandatory maternity leave at a set time during their pregnancies regardless of the individual

woman's health and ability to perform her job. The Court in each case required state officials to make "individual" determinations regarding residency and ability of each rather than mechanical application of an irrebutable presumption. See also, Stanley v. Illinois, 405 U.S. 645 (1972) (irrebutable presumption that unmarried fathers are incompetent to raise their children held to violate due process clause).

Defendant Katz does not contend that named plaintiffs did not (and do not) understand the consequences of the marriage contract. He made no attempts to reach an "individualized" determination of plaintiffs' understanding or to prove that his irrebutable presumption is "necessarily or universally true." Rather, he has stated only that his regulations reflect "both my feeling and what I believe is the community feeling" (A79). That is not sufficient basis for the creation of an irrebutable presumption under the Supreme Court's tests in Vlandis and LaFleur.

Point VI. DEFENDANT'S REGULATIONS ARE NOT REASONABLY RELATED TO A LEGITIMATE STATE INTEREST

Once plaintiffs have shown that they possess a constitutional right which is being violated by a public official, the burden shifts to that official to prove that his regulation

is in some way related to furthering a legitimate state interest. Dwen v. Barry, supra. Defendant Katz failed to meet that burden. He did not even attempt to show that his regulation in any way is related to the legitimate state interest of ensuring that couples enter into marriage knowingly and willingly. He simply expressed his personal opinion (an opinion that frequently appears in fairy tales and mythology), that an individual has only to don particular clothing in order magically to gain understanding. This incredible belief led one of his agents to agree to marry a woman, who had brought no skirt with her, if she would remove her offending slacks, presumably in the belief that she would be more knowledgeable in her underwear (A26-27).

Defendant asks this Court to believe that plaintiff Rappaport did not "understand" the consequence of the marriage contract as she stood there in her velvet pants suit, but that a quick change into a skirt produced the requisite understanding. His Clark Kent-Superman theory of human understanding is too absurd for extended comment.

Addressing the similar proposition that the grades of long-haired students would automatically rise after a visit to a barber, Judge Aldrich found in his concurring opinion in Bishop v. Colaw supra at 1077 that:

> No evidence has been presented that hair is the cause, as distinguished from a possible peripheral consequence of undesirable traits, or that the school board, Delilah-like, can lop off these characteristics with the locks.

Similarly, defendant's personal belief in the power of clothing to endow understanding is not sufficient evidence of the rational relationship of defendant's regulations to a legitimate state purpose to justify them.*

In fact, defendant's regulations further no state interest whatsoever but rather reflect only his personal values. Not only does he require couples to show that they understand marriage by dressing according to his taste, but he also requires that their clothing show that they have a "respectful and solemn" attitude towards marriage (A59); that they not attempt "to symbolize their political advances by what they wear" at their weddings (A 51); they they not "degrade the marriage ceremony" (A 51) or show "a complete negation of the fact that a women is involved" (A70) by wearing slacks; and that they recognize that "this is a man and a woman as a program, it's not equality" (A70). The state has no interest

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*It is hardly necessary to point out that some of the most serious and distinguished thinkers in the world have been notoriously eccentric in matters of dress. One judge, sitting on a school long-hair case, commented that the students who appeared before him looked considerably neater than Albert Einstein. Abigail Adams described herself as "looking like an unmade bed" and an admirer said of Virginia Woolf that she often appeared to have been "dragged through a hedge backwards."

in requiring that persons who wish to marry hold or not hold any of these beliefs or attitudes. It is no business of the state or of defendant Katz what they feel or believe.*

Nor is there state interest in protecting defendant Katz, as officiant at a marriage from being offended by the dress of the bride and groom, as he has claimed.

There is no right of a public official not to be offended or to refuse to perform his statutory duty because of personal prejudice. To hold otherwise would be to say that if the next City Clerk preferred women in slacks, he could rule that all brides must wear slacks. Such an example is not far-fetched: at the last session of the New York State legislature, former Speaker of the Assembly Perry Duryea promulgated a regulation (which he later withdrew) requiring girl pages in the assembly to wear slacks because he believed slacks were more appropriate than skirts (A118).

The police officials in Dwen v. Barry, supra, were no doubt "offended" by patrolmen wearing beards, but this Court did not consider that offense to be a legitimate state interest. And the school and college dress codes struck down by numerous

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Few would suggest that these persons would have lacked the requisite understanding of the marriage contract.

*Courts have indicated various state interests that they would consider, if proven, to be legitimate justification for regulating personal appearance. For example, courts have required defendant school officials to prove that school dress codes were necessary to prevent "material and substantial disruption" of school functions or health and safety problems

federal courts no doubt prohibited dress that was "offensive" to school and college officials.

The arbitrary, irrational, and personal nature of defendant's dress code regulation can further be illustrated by reference to wedding attire that others might consider "inappropriate" which is nevertheless permitted by defendant's regulation. For example, brides in graffiti-covered mini-skirts may be married by the City Clerk. (A67). Why is a mini-skirt more "appropriate" than slacks? Because, says defendant, "a skirt is a skirt." (A67).

Point VII. PLAINTIFFS MAY NOT CONSTITUTIONALLY BE REQUIRED TO DRESS ACCORDING TO COMMUNITY STANDARDS

The final justification offered by defendant for his regulation is that the question of what attire is appropriate at a wedding is one best left up to the community.

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which would interfere with the legitimate goal of education, Richards v. Thurston, supra. Police officials were required to present evidence that a regulation against police officers wearing beards was necessary to further the goal of police efficiency by maintaining discipline, Dwen v. Barry, supra; and jail officials were required to prove that a regulation prohibiting beards and long hair on prisoners was necessary to prevent the spread of lice and to make identification of prisoners easy, thus maintaining sanitation and security in the jail, Seale v. Manson, supra. This type of concrete justification is clearly very different from the subjective rationalizations offered by defendant Katz.

This reasoning simply demonstrates defendant's complete ignorance of basic constitutional principles. The individual's constitutional right to dress as he pleases is no more subject to community censorship than is his right to say what he pleases.

This principle was upheld in a recent school dress and hair case, Arnold v. Carpenter, supra, in which the court found the code unconstitutional even though it had been developed by a committee of students elected by the student body, teachers, and administrators, and had been adopted by a majority of the students. The court concluded that the democratic process used in adopting the code did not justify the denial of the plaintiff's constitutional right to wear his hair in the style he chose. Similarly, in Bishop v. Colaw, supra at 1077, the court states:

> Nor does the acceptance of the dress code by the majority of the...community and students justify the infringement of [the plaintiff's] liberty to govern his personal appearance. Toleration of individual differences is basic to our democracy whether those differences be in religion, politics or life-style.

See also, Massie v. Henry, supra.*

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*Even if the bride's and groom's dress at a wedding was a matter to be left up to the community, defendant has produced no evidence at all that his standards, as reflected by his regulations, are in fact the standards of the community and plaintiffs are prepared to prove at trial that in fact they do not reflect durrent community standards.

Point VIII. DEFENDANT'S REGULATIONS ARE ENFORCED ARBITRARILY AND DISCRIMINATORILY

Although defendant's written regulations are all couched in equally stringent language, they are not equally enforced. Concerning the regulations requiring an exchange of rings, defendant says that in fact a ring is "not a vital sine qua non with respect to my performing the marriage." (A96). Rather, any token may be exchanged by the bride and groom. This exception is not in writing, however, and is not communicated to a couple unless they object to the exchange of rings. Thus, a docile couple who simply read the rules and accept it as law will exchange rings, even if they don't wish to, while a more knowledgeable couple may avoid the apparent requirement. Similarly, although the requirement that men wear ties appears to be absolute, defendant will make exceptions for a man wearing a turtleneck sweater or other "high collared affair" because it "doesn't take a tie, so no tie is necessary." (A60). Again, the exception is not in writing, and is not communicated to grooms who do not inquire about or object to the regulation.

The regulation prohibiting slacks, however, is an "absolute prohibition" although "anything else is modified according to the conditions." (A63). Thus, not only are defendant's regulations arbitrarily enforced, but they are en-

forced unequally against women because women, unlike men, are granted no leeway in choosing their manner of dress.

Point IX. THE LOWER COURT SHOULD HAVE PERMITTED THIS CASE TO BE MAINTAINED AS A CLASS ACTION

The lower court refused to grant plaintiffs' motion for an order that this suit might be maintained as a class action on the grounds that the class* was an "amorphous, imprecise group" which was "neither distinguishable nor definable and that there was no showing that members of the class shared the complaint of the named plaintiffs.

Plaintiffs first maintain that their class is in no way amorphous or indefinable. On the contrary, it is very precise: any person becomes a member of the class upon asking to be married by the City Clerk. There is no possibility of doubt as to the individual's status, as there is with the "civil rights workers" in Chaffee v. Johnson, 229 F. Supp. 445 (S.D.

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*"All persons who wish and are legally entitled to be married by the defendant."

Miss. 1964), or citizens who "have, do or intend to advocate ideas" in American Servicemen's Union v. Mitchell, 54 F.R.D. 19 (D.D.C. 1972) cited by Judge Pollack. In those cases, the subjective state of mind of the individual places him in a class. Here, individuals are placed in the class by defendant when he subjects them to his regulations.

As to whether plaintiffs adequately represent the class, the issue is not whether all of the women who come to be married by the City Clerk want to wear pants to their weddings. If the standard for maintaining a class action were that all members of a class must want to exercise their rights, no suit could be maintained as a class action. The question is rather whether all members of the class are equally subject to a particular policy or practice, as they are in this case. Defendant's regulations call for no subjective criteria that must be evaluated in each case such as "neat" or "appropriate" nor do they permit consideration of individual circumstances. No woman who wears pants will be married; no man without a jacket will be married; no couple refusing to exchange rings will be married. This situation is very different from the cases relied upon by Judge Pollack where the statutes involved could not, by their nature, be uniformly enforced without re-

gard to individual circumstances as can the regulations complained of herein.

In order to represent a class, it is only necessary that there be no express conflict between the representatives and the class represented over the issues involved in the litigation. Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968). See also, Eisen v. Carlisle and Jacqueline, 391 F.2d 555 (2d Cir. 1968). In Mersay, the named plaintiff brought a class action on behalf of defrauded shareholders. The court allowed the action to be maintained even though plaintiff, unlike most of the class, was not in fact injured. In Klein v. Nassau County Medical Center, 347 F. Supp. 496, 499 (E.D.N.Y. 1972), a class action was upheld even though the membership of the class (pregnant women seeking abortions under medicaid) was constantly changing:

> The issues of the right presented are such that "class" action is peculiarly appropriate, indeed necessary. Defendants' refusal to act as plaintiffs requested was based upon grounds generally and uniformly applicable to the class of which plaintiffs were members at the time they joined or initiated the action as parties plaintiff.

In this case, if plaintiffs prevail, no one will be forced to dress in a manner unacceptable to him or her. It will sim-

ply give them the opportunity to choose what to wear by themselves. Thus, it is impossible to see what conflict could possibly exist between plaintiff and members of the class.

Subsection 23(b)(2) of the Federal Rules of Civil Procedure* under which this case falls, was designed to be liberally construed. As the Advisory Committee noted of the then proposed Rule 23:

> Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or a few members of a class; provided it is based on grounds which have general application to the class. 39 F.R.D. at 102.

See, Arkansas Educ. Association v. Board of Education of Portland Arkansas School District, 446 F.2d 763 (8th Cir. 1971).

Civil rights suits generally fall into the 23 (b)(2) subdivision. Such suits, as does the instant case, challenge statutes, rules or ordinances that are constitutionally offensive. Basic to the "congenial" judicial attitude in such in-

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*Federal Rule 23(b) provides that: "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:...(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

stances is the understanding that relief will benefit the named claimants and all others subject to the rule under attack. Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), cert. denied 376 U.S. 910. See also, Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), cert. denied, 341 U.S. 940. Subsection (b)(2) is also applicable to controversies concerning constitutional rights generally. Mick v. Sullivan, 476 F.2d 973 (4th Cir. 1973)(challenging public school's student dress code); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971) (voting rights); Torres v. New York State Department of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970)(unemployment compensation terminated without a hearing); and First Amendment guarantees, Livingston v. Garmire, 437 F.2d 1050 (5th Cir. 1971)(challenge of disorderly conduct ordinance). If the party opposing the class has acted in a consistent manner against the class, Russo v. Kirby, 335 F. Supp. 122 (E.D.N.Y. 1971); Battle v. Municipal Housing Authority, 53 F.R.D. 423 (D.C.N.Y. 1971), or has established a regulatory scheme common to all members of the class, Almenarez v. Wyman, 334 F. Supp. 512 (S.D.N.Y. 1971); Cole v. Housing Authority of City of Newport, 312 F. Supp. 692 (D.R.I. 1970), the generally applicable to the class "prerequisite" has been satisfied.

This suit fulfills all of the requirements for being

declared a class action and the court below erred in refusing to permit it to be maintained as one.

CONCLUSION

The court below's dismissal for lack of jurisdiction was in error. Defendant's regulations are arbitrary and discriminatory, denying plaintiffs their constitutional rights to free expression, privacy, due process and equal protection of the laws. For the foregoing reasons, the decision of the court below should be reversed and remanded.

Respectfully submitted,

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